18-3193

United States Court of Appeals
for the Second Circuit

Danny Donohue, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Plaintiffs-Appellants,

v.

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Patricia A. Hite, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, Caroline W. Ahl, in her official capacity as Commissioner of the New York State Civil Service Commission, J. Dennis Hanrahan, in his official capacity as Commissioner of the New York State Civil Service Commission, Robert L. Megna, individually and in his official capacity as Director of the New York State Division of the Budget, Thomas P. DiNapoli, in his official capacity as Comptroller of the State of New York, Janet DiFiore, in her official capacity as Chief Judge of the New York State Unified Court System,

Defendants-Appellees,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
(1:11-cv-01530-MAD-CFH)

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

In an effort to avoid liability for their violations of the underlying collective bargaining agreements ("CBA"), Defendants-Appellees ("Defendants") argue that such health insurance provisions do not contain durational language providing for vesting of a fixed contribution rate to Plaintiffs-Appellants ("Plaintiffs") in retirement. In the same breath, however, Defendants do not dispute that "in certain CBAs, it [the State] agreed to make health insurance available to retirees with 10 years of service." (Br. p. 59)[1]. Defendants further acknowledge and admit that "the CBAs' assurance of continued health-insurance coverage vested a right for retirees to be covered is not at issue here." (Br. p. 13). While Defendants claim that they do not have an obligation to provide a fixed contribution rate to health insurance beyond the expiration of the CBAs, a reasonable interpretation of these health insurance provisions provides otherwise.

As set forth below, as well as in Plaintiffs' main brief, Defendants' arguments fail to recognize the unique factual circumstances of this case when interpreting the language of these CBAs. Specifically, the provisions of these CBAs provide proof, or at a minimum raise a question of fact, that the parties intended for health insurance contribution rates to remain fixed upon the retirement of a bargaining unit employee and to survive the expiration of the collective bargaining agreements. Contrary to

[1] References to Defendants' Brief will be denoted herein as (Br. p. ___).

Defendants' assertions, these provisions do not create, as set forth by *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015), and *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018), lifetime vesting in silence. Just as Defendants admit that the CBAs create an obligation to provide for a lifetime of health insurance for those employees with 10 years of service, so too does such obligation extend to a fixed contribution rate in retirement.

Moreover, Defendants erroneously gloss over Plaintiffs' state law claim for breach of contract and, in doing so, quickly dismiss the New York State Court of Appeals' holding in *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013). As seemingly combining both Plaintiffs' federal contract impairment claim and state law breach of contract, Defendants assert that since *Kolbe* was decided prior to *M&G Polymers*, its holding is no longer controlling. (Br. p. 49). However, and as stated by Defendants, Plaintiffs' cited subject state law cases are relevant to Plaintiffs' state law breach of contract claims. (Br. p. 48).

For the reasons set forth herein and in Plaintiffs' main brief, the district court's order granting Defendants' motion for summary judgment, and denying Plaintiffs' cross motion for summary judgment, should be reversed. Finally, if a question of fact is found to remain, the matter should be remanded to the district court.

ARGUMENT

DEFENDANTS' CONCESSION TO A VESTED RIGHT TO RETIREE HEALTH INSURANCE AFTER 10 YEARS OF SERVICE ILLUSTRATES THAT THE PARTIES INTENDED FOR FIXED CONTRIBUTION RATES TO SURVIVE PAST THE GENERAL DURATIONAL CLAUSE.

A. Plaintiffs' Contracts Have Been Created Under the Taylor Law, Not Federal Labor Statutes.

To be clear, the collective bargaining agreements between CSEA and the State of New York were created under the authority of New York Civil Service Law Article 14, the Public Employees' Fair Employment Act, also known as the Taylor Law. These agreements were not created pursuant to Employee Retirement Income Security Act ("ERISA") or the Labor Management Relations Act ("LMRA"). As former public employees, Plaintiffs are excluded from the coverage of the LMRA and ERISA. *See*, *Baumgarten v. Stony Brook Children's Services, P.C.*, 249 Fed. Appx. 851 (2d Cir. 2007).

Unlike in the private sector and the analysis contained within *M&G Polymers* and *CNH Industrial*, under the New York Taylor Law, health insurance benefits for current employees once they retire are a mandatory subject of bargaining. Not only is retiree health insurance a mandatory subject of negotiations, but it is a subject area that is routinely negotiated between an employer and a collective bargaining unit. On numerous occasions, the New York State Public Employment Relations Board ("PERB") has held that retiree health insurance is a mandatory subject of

negotiations between a bargaining agent and an employer. *See, Chenango Forks CSD*, 40 PERB ¶3012 (2007); *Cohoes Police Benevolent and Protective Ass'n.*, 27 PERB ¶3058 (1994); *Bridge and Tunnel Officers Benevolent Ass'n.*, 29 PERB ¶3012 (1996).

Further, contrary to the private sector, in the public sector in New York, the Triborough Amendment (NY Civ. Serv. §209-a.1(e)), which codified existing caselaw of the PERB, provides that the terms of an expired agreement remain in full force and effect until a successor agreement has been negotiated.

B. Plaintiffs' Contract Related Claims are Based on Collective Bargaining Agreements and are Distinguishable from Those Rejected in the *RPEA* Litigation, Which Were Based Exclusively on Statute.

Plaintiffs' contract claims and contractual impairment claims are based upon the collective bargaining agreements in effect at the time each of the Plaintiffs retired. The State incorrectly claims that, in *Retired Public Employees Ass'n, Inc. v. Cuomo*, No 7588-11, 2012 WL 6654067 (Supm. Ct. Albany Cty. Dec. 17, 2012) the Retired Public Employees Association ("*RPEA*") asserted "the same contract-impairment claim asserted in these cases," and misunderstands the court's holding in that case when it argues that the rejection of *RPEA's* claims should be relied upon to defeat Plaintiffs' contract claims and contract impairment claims in this matter. (Br. 25, 40-42 and 85).

There is a fundamental distinction between the class of employees in the *RPEA* litigation and the class of employees in the instant litigation, which the State neglects to mention. The *RPEA* plaintiffs were not covered by collective bargaining agreements, made no allegation that their health benefits were ever provided pursuant to a collective bargaining agreement, and made contract impairment arguments based solely on the existence of a statute. Here, Plaintiffs, like the retirees from each of the unions in the related cases, were covered by collective bargaining agreements, alleged and offered proof that they received their health benefits while employed and after their retirement based upon collective bargaining agreements, and make their contractual and contract impairment arguments based on the collective bargaining agreements under which they retired. Because *RPEA's* contract impairment claim is fundamentally different than Plaintiffs' herein, the *RPEA* decision has no relevance to Plaintiffs' contract related claims.

Plaintiffs herein rely upon their collective bargaining agreements (J.A. 1056-1064, 1066-1068), and assert that New York Civil Service Law §167 was enacted to implement their collectively negotiated agreements. (J.A. 1407-1418).[2] Plaintiffs further assert that Civil Service Law §167 provides further evidence of what was negotiated between the parties. The existence of collective bargaining agreements governing health benefits in retirement in the instant case renders the decision in

[2] References to the Joint Appendix are denoted herein as (J.A. ___).

RPEA irrelevant to the court's analysis in this case. *See Retired Employees Ass'n, Inc. v. Cuomo,* 123 A.D.3d 92 at 96 (3d Dep't 2014) (noting that *RPEA* **did not** allege any contractual agreement regarding retiree health benefits, relying only on Civil Service Law §167 as its source of right).

In denying the State's motion to reconsider its denial of the State's motion to dismiss below, based on the December 17, 2012 Decision/Order/Judgement in *RPEA v. Cuomo, et. al.* (Sup. Ct. Albany County) (Index No. 7586-11), the District Court expressly noted that, "…defendants do not address the clear factual differences between the *RPEA* petitioners' contract clause claims and Plaintiffs' claims herein. In this matter, Plaintiffs assert their Contract Clause claims relying upon various Collective Bargaining Agreements...Conversely, the petitioners in *RPEA* based their Contract Clause claims upon Civil Service Law § 167(8) arguing that the statute violates the Contract Clauses." (J.A. 587).

The *RPEA* plaintiffs did not base their impairment claim on the collective bargaining agreements under which they retired; rather, they based their claim solely on New York Civil Service Law §167(a)(1) itself, alleging that it alone created contract rights. The distinction between the claims raised in *RPEA* and those of the plaintiffs herein can be easily gleaned from the *RPEA* decision itself, where the court found that:

> [The RPEA] Petitioners have failed to allege the existence of an actual contract during the period of their employment which

> provided that the State is obliged to continue contributing to public retirees' health care at the level applicable at the time of retirement. Thus, petitioners' position is clearly distinguishable from that of retirees whose future health care coverage was assured in collective bargaining agreements that unambiguously provided for continued coverage at a fixed rate for retirees at all times subsequent to their retirement (*Hudock v. Village of Endicott*, 28 AD3d 923, 924 [3d Dept., 2006]; *Della Rocco v. City of Schenectady*, 252 AD2d 82, 84 [3d Dept., 1998]; *Myers v. City of Schenectady*, 244 AD2d 845 [3d Dept, 1997]; *DiBattista v. County of Westchester*, 35 Misc3d 1205(A), 2008 WL 8783343 [Westchester Co., 2008]).
> *Retired Public Employees Ass'n, Inc. v. Cuomo*, No 7588-11, 2012 WL 6654067 at p. 14.

(J.A. 565).

In contrast to the allegations made by the Plaintiffs in the instant matter, the legal claims plaintiff-petitioners submitted in the *RPEA* matter are clearly distinguishable from the legal claims Plaintiffs submitted herein. Here, Plaintiffs alleged and established that their future health care coverage, as retirees, were assured in collective bargaining agreements providing continued coverage at a fixed rate of premium contribution for retirees at all times subsequent to their retirement. Unlike the plaintiffs-petitioners in *RPEA*, Plaintiffs herein do not rely on Civil Service Law §167(a) by itself to find a contract right.

The State's argument that the *RPEA* decision, finding no contractual obligation to continue retiree health insurance for retirees at a fixed rate in the absence of a collectively bargained agreement covering the *RPEA* plaintiffs, supports a similar finding herein is without merit. The same argument was disregarded herein

below and should be disregarded on appeal because Plaintiffs have alleged and established collectively bargained agreements providing for continued health insurance in retirement at fixed contribution rates.

C. Plaintiffs' Interpretation of the Plain Language is Reasonable and Should, at a Minimum, Require the Court to Consider Extrinsic Evidence.

When a contract is ambiguous, courts can consult extrinsic evidence to determine the parties' intentions. *CNH Industrial N.V. v. Reese,* 138 S.Ct. 761 (2018) *see M&G Polymers USA, LLC v. Tackett,* 135 S.Ct. 926, 930 (2015) *citing* 11 R. Lord, Williston on Contracts § 30:7, pp. 116-124 (4th ed. 2012) (Williston); *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (NY 2013). If "after applying established rules of interpretation, [it] remains reasonably susceptible to at least two reasonable but conflicting meanings," then the language is ambiguous and the Court should consult extrinsic evidence to determine the parties' intentions. *CNH Industrial N.V. v. Reese,* 138 S.Ct. 761 at 765; *Kolbe v. Tibbetts*, 22 N.Y.3d 344 at 355. Defendants' reliance upon *Marine Midland Bank* for the proposition that Plaintiffs are attempting to alter plain language is misplaced, since the collective bargaining agreements do not contain explicit language providing that premium contribution rates may be unilaterally changed at any time for retirees. *See, Marine Midland Bank-S. v. Thurlow,* 53 N.Y.2d 381 (N.Y. 1981).

Here, Section 9.14(a) of the collective bargaining agreements between CSEA and the State provide for the following:

> The State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. Effective October 1, 2011 for employees in the Salary Grade 9 or below or an employee equated to a position title Salary Grade 9 or below, the State agrees to pay 88 percent of the cost of individual coverage and 73 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance components provided under the Empire Plan. Effective October 1, 2011 for employees in a title Salary Grade 10 and above the state agrees to pay 84 percent of the cost of individual coverage and 69 percent of the cost of dependent coverage towards the hospital/medical/mental health and substance abuse components provided under the Empire Plan.

(J.A. 865, 1261, 1289, 1309, 1337).

Section 9.26(a) in the 2011-2016 contract, contains substantially the same language in the health insurance Article since the 1982-1985 contract:

> The unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage.

(J.A. 1126-1127 ¶¶44-46; 1268-1269, 1293, 1313, 1344).

Section 9.27(a) in the 2011-2016 contract, contains substantially the same language in the health insurance Article since the 1982-1985 contract:

> Employees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service.

(J.A. 1125 ¶37).

First, the State does not dispute that there is a vested right to health insurance in retirement for Plaintiffs with 10 years of State service. (Br. 59). Indeed, Article 9.27(a) does not contain a separate durational clause, but the State concedes that retiree health insurance benefits vest with retirees that attain 10 years of State service. (Br. 59). A reading of the clauses at issue in Article 9, the health insurance article, along with Defendants' concession, illustrate that Plaintiff's interpretation is reasonable and that if there was a vested right to health insurance in retirement there is certainly a vested right to a fixed percentage of premium contribution.

As there appears to possibly be two reasonable but conflicting meanings, under *M&G Polymers*, *CNH Industries,* and *Kolbe,* the Court should consider extrinsic evidence in order to determine the intent of the parties. Therefore, the Court should consider the bargaining history and the State's proposals in 1991, 2003, and 2007, where it sought to change retiree health insurance contributions to a sliding scale. It defies logic why the State would make proposals at the bargaining table over a 16-year time frame, concerning a mandatory subject of negotiations, if it had the authority to unilaterally impose what it sought, namely an increase in the percentage of premium contributions retirees would be required to pay.

Further, as amended, Civil Service Law § 167(8) provided:

> Notwithstanding any inconsistent provision of law, *where and to the extent that an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides*, the state cost of premium or subscription charges for eligible employees covered by such agreement may be modified pursuant to the terms of such agreement. The president, with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges *for employees or retirees not subject to an agreement referenced above* and shall promulgate the necessary rules or regulations to implement this provision. (Emphasis added).

Benefits for already retired employees are non-mandatory subjects of bargaining since they are no longer employees and therefore not entitled to representation in future negotiations. *Patrolmen's Benevolent Assn,* 37 PERB ¶3033 (2004). However, employees that retire from State service may still be subject to the provisions contained in expired collective bargaining agreements. Clearly, the plain language of §167(8) contemplates that retirees subject to a collective bargaining agreement while they were active employees are still subject to the provisions contained in the collective bargaining agreements as it relates to health insurance, and specifically, the retiree's responsibility of his or her percentage of premium contribution. The State's assertion that retirees are automatically persons not covered by the terms of a collective bargaining agreement are not supported by the plain language of the statute. (Br. 22).

In addition, Defendants, without citation to any authority, claim that the first sentence in Section 9.14(a) in the 2011 to 2016 collective bargaining agreement, remained in the clause because the new contributions for employees going forward would not be uniform. (Br. 60-61). This unsupported claim is directly in contradiction to Ross Hanna's unrefuted statements contained within his declaration and his understanding of the language as CSEA's negotiator of the collective bargaining agreements with the State for 29 years. (J.A. 1125). Specifically, Mr. Hanna asserted that based upon his experience as a CSEA negotiator for 29 years, once a CSEA member had completed 10 years of service with the State, that member was entitled to health insurance in retirement. (J.A. 1125). Mr. Hanna further asserted that the language in the collective bargaining agreements that provided for the State's percentage of premium payment did not specifically apply to active employees or retirees since it applied to all individuals entitled to participate in the State Health Insurance Plan. (J.A. 1125).

Furthermore, Mr. Hanna's understanding was that these two provisions of the CSEA labor contracts meant that a post-1983 retiree would be entitled to health insurance coverage with the State paying 90% of the cost of individual coverage and 75% of the cost of dependent coverage upon completion of 10 years of State service. (J.A. 1125). Finally, despite the State's proposals to change the eligibility and contribution rates for retiree health insurance, the parties, however, had never agreed

to change or modify this language and the practice of providing retiree health insurance contribution rates for retirees at 90% for individual coverage and 75% for dependent coverage remained unchanged until October 1, 2011. (J.A. 1125).

It should also be noted that Defendants claim that the clause in the collective bargaining agreements from 1991 until 2004 containing language regarding Government Accounting Standards Board requirements provides no evidence of vesting fails, because it is contrary to the plain language. (Br. 65). The language provides:

> Employees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service. However, in recognition of the forthcoming changes to the Government Accounting Standards Board (GASB) requirements, both the State and CSEA recognize the need to address the inequity of providing employees who serve the minimum amount of time necessary for health insurance in retirement which the same benefits as career employees. Prior to the expiration of this contract CSEA and the State shall, through the Joint Committee process, develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated.

(J.A. 972, 997, 1018, 1120).

Indeed, the spirit of the language is to express the concern of the cost to the State for health insurance benefits, including premium contributions, for CSEA bargaining unit members that work ten years and retire versus those CSEA members that work their entire career with the State and earn the same benefit. Finally, Mr. Hanna explained that it was CSEA that wanted this language removed since it was

not interested to negotiate a reduced benefit for its members in retirement. (J.A. 1120).

D. Defendants' Reliance Upon *Bouboulis* is Misplaced.

Defendants misconstrue and misapply the holding of this Court's decision in *Bouboulis v. Transport Workers Union*, 442 F.3d 55 (2d Cir. 2006), with respect to the underlying unremarried spouse clause. In its attempt to claim that the unremarried spouse health insurance provision does not provide proof of a vested right to a certain contribution rate in retirement, Defendants fail to set forth the underlying factual circumstances of *Bouboulis*, calling for this Court's holding. In *Bouboulis*, the retirees claimed entitlement to lifetime retiree health insurance where there was no underlying collective bargaining agreement, but rather only a summary plan description and a letter to retirees, as ERISA benefit plan participants. Both of these documents were found to contain no language addressing vesting and the surviving spouse language, could not, on its own, create vesting for the retiree. *Id*. at 63. Here, the various provisions of the CBAs provide sufficient evidence to establish a fixed contribution rate.

Defendants have not shown that the increase in contribution rates, made effective in 2011, was reasonably foreseeable as to violate their obligations under the respective labor contracts. When looking at the custom and practice of collective bargaining negotiations in interpreting this language, it is notable that in each round

of negotiations for successor labor agreements during the past 29 years, Defendants proposed changing and shifting health insurance costs. (J.A. 1126). While Defendants claim that such proposals should have created an expectation for Plaintiffs that "their share of health-insurance premium contributions would never increase" (Br. p. 100), the opposite is, in fact, true. For decades, however, Plaintiffs' health insurance contribution rates never increased, despite Defendants' proposals to change such costs. Even though Defendants made various proposals to shift costs to retirees, no changes were ever made to retiree health insurance contributions from January 1, 1983 to October 1, 2011. Therefore, Plaintiffs never saw an increase to their contribution rates during this period and it is reasonable for such individuals to expect that their contribution rates would remain constant.

Furthermore, Defendants inappropriately conclude that escalating costs for "almost everything--, especially health care," made it unreasonable for retirees to expect that they would never experience an increase in health insurance costs. (Br. p. 100). Looking at the health insurance provisions contained within the CBAs and the contract proposals of Defendants, it was reasonable for a retiree to believe that, at the time of retirement, their rate of health insurance would not change.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Plaintiffs' main brief, Plaintiffs respectfully request that the Court: (1) reverse the District Court's decision granting Defendants' motion for summary judgment; (2) reverse the District Court's decision denying Plaintiffs' cross motion for summary judgment; (3) or, in the alternative, remand the matter to the District Court for a new determination, including but not limited to, a trial to determine any questions of material fact.

Dated: August 7, 2019
Albany, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because this brief contains 3,635 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14 point Times New Roman font.

Dated: August 7, 2019
Albany, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Danny Donohue, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Plaintiffs-Appellants,

-against-

SECOND CIRCUIT
Docket No. 18-3193

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Patricia A. Hite, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, Caroline W. Ahl, in her official capacity as Commissioner of the New York State Civil Service Commission, J. Dennis Hanrahan, in his official capacity as Commissioner of the New York State Civil Service Commission, Robert L. Megna, individually and in his official capacity as Director of the New York State Division of the Budget, Thomas P. DiNapoli, in his official capacity as Comptroller of the State of New York, Jonathan Lippman, in his official capacity as Chief Judge of the New York State Unified Court System,

Defendants-Appellees,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I electronically filed with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the parties listed below, and served **two (2) true copies of the Reply Brief** on behalf of Plaintiffs-Appellants, by UPS/overnight mail, addressed to the last known address of the addressee as indicated below:

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